No. 11,934

IN THE

United States Court of Appeals

For the Ninth Circuit

WARREN L. HAGER,
Appellant,

vs.

CLYDE E. GORDON,
Appellee.

BRIEF FOR APPELLEE.

WARREN A. TAYLOR,
P. O. Box 200, Fairbanks, Alaska,
Attorney for Appellee.

Table of Authorities Cited

Statutes

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Plaintiff relies upon alleged erroneous instructions of law and calls the Court's attention to Instruction I-A-(4) (Tr. p. 11) as placing too great a burden of proof on the plaintiff. The instruction in question correctly states the question of fact raised by the testimony of the plaintiff. The Court was only outlining what the plaintiff had raised by his pleading and proof. It was certainly incumbent for the plaintiff to prove ownership of the vessel and barge to prevail in an action in claim and delivery. Paragraph I of plaintiff's first cause of action alleges: "That the plaintiff is now and at all times herein mentioned has been the owner and entitled to the possession of the hereinafter described property, * * *: One certain power boat with stern wheel named the 'Elaine G'

and one certain power driven barge * * * 'Elaine G' * * *." Paragraph II of plaintiff's first cause of action alleges that on the 20th day of April, 1946, plaintiff was in possession, and we presume as owner as he has alleged to be such owner in the preceding paragraph.

It is difficult to follow plaintiff's reasoning that the burden of proving by a preponderance of the evidence the material allegations of his complaint works a hardship on plaintiff. That is a rudimentary rule of law followed by all our Courts. Nothing in the present action would give the District Court or this Circuit Court cause or reason to relax the rule in favor of the plaintiff.

Instruction III (Tr. p. 13) correctly states the law regarding the recovery of property under our claim and delivery statute. Section 3494 Compiled Laws of Alaska, provides that the plaintiff or some one in his behalf shall make an affidavit showing "that the plaintiff is the owner of the property * * *."

Plaintiff's reasoning in regard to the Court's confining plaintiff's proof of ownership to April 20, 1946, is somewhat difficult to follow, as plaintiff sets that date out in his complaint as the date upon which he alleges the defendant took said boat from his possession. On that date he had to establish ownership or right of ownership to prevail in this action. The instructions regarding the verdict were correct. To prevail upon his second cause of action, the plaintiff necessarily had to prevail in his first cause of action. But the jury could not split the verdict.

Plaintiff complains that the figure $55,000.00 used by the trial Court as the value of the boat was erroneous, but plaintiff's proof indicated that as the value of the boat and barge, but in no way directed that a verdict of that amount would have to be returned by the jury. The boat was available and would have been returned to plaintiff in the event the jury had returned a verdict in his favor. Nowhere did the plaintiff ask for or hoped to receive $55,000.00. The instruction of the Court was not based upon the pleading, but upon the proof offered by plaintiff. Plaintiff has not indicated in his brief that he offered further and other forms of verdicts for the jury's consideration, and cannot therefore now complain.

There is slight discrepancy in the testimony of plaintiff and defendant regarding the contract between them. It is admitted that plaintiff was to assist in building the boat and barge with defendant furnishing the money which he raised by mortgaging his boat "Bonnie G" and barge, and also the boat and barge to be constructed. Plaintiff admitted that the money used to buy the quonset huts, Ford pick-up and other expenses was from the funds provided by defendant. It is admitted that the expenses were to be prorated, two-thirds to the "Elaine G" and the barge used in connection therewith, and one-third to the barge to be constructed for use with the "Bonnie G", defendant's boat. This computation was carried out by Thomas Wright and Kohler and Boulet, accountants employed by the respective parties, with an exception, Mr. Wright, accountant for plaintiff, failed to compute income tax on the earnings of the "Elaine

G'' and barge, which income tax was charged against the Gordon Transportation Company, contractor for the U. S. Army. Income tax is a properly allowable item to be charged against the operation of the boat and barge. It would not be just to say that the boat and barge and operation cost $50,000.00; the income was $52,000.00 and that the income tax on the net profit of $50,000.00 should not be deducted from the gross profit. If such was the case the defendant would have to deliver the boat and barge to the plaintiff and then pay over $15,000.00 to the Internal Revenue in taxes. Defendant was the operator and charged with the tax. Mr. Boulet testified that the income tax on the earnings of the ''Elaine G'' and barge operated by plaintiff was $15,716.00 and the income tax on the ''Bonnie G'' was $7,630.00. None of this income tax was paid, but all chargeable to defendant. Nor was depreciation charged against the ''Elaine G''. Ten per cent depreciation would bring the total earnings below cost of building and operation. Counsel for plaintiff indulges in conjecture in his third assignment of error (Tr. pp. 110, 111) in stating that there is no evidence that the income tax would not have been paid the following year. It was the duty of the plaintiff to compute the income tax on the earnings of the ''Elaine G'' and show that the same had been paid. On March 15, 1946, it had not been paid and on April 20, 1946, defendant took the boat and barge from the ways.

Next we must consider the testimony of ''Doc'' Gordon, defendant, that in 1946, he spent $5,000.00

in new equipment in addition to the labor involved in the installation thereof. (T.R. p. 148.) Plaintiff places undue emphasis upon his fourth point relied upon for reversal of the judgment, to-wit: the allowance of an attorney fee in the sum of $5,000.00, and defendant's costs. This point is not well taken as plaintiff prayed for a reasonable attorney fee and costs. He submitted all his evidence to substantiate the allegations of his complaint, but no place in the record does it indicate that he offered any evidence of the reasonable worth of the attorney fee prayed for. He relied upon the accepted practice of the trial Court in fixing the compensation of the prevailing party. Plaintiff is in error when he alleges that while the case was pending the Legislature of Alaska amended the law regarding allowances of attorney fees by the Court. This action was filed on the 13th day of May, 1947, whereas the amendment to Section 4065, Compiled Laws of Alaska, 1933, was approved March 27, 1947, and was in effect at all times during the progress of this action. Therefore, the argument of counsel for plaintiff that the amendment of the law allowing attorney fees by the Court was passed during the trial of this action has no truthful basis.

It is true that this was the third action filed by plaintiff against defendant, but the first two were based upon a different theory than the cause at issue.

The first action was commenced by the plaintiff within a few weeks after the end of the season's work in 1945, and before the defendant had had an opportunity to assemble the bills, invoices and other data

necessary to arrive at the amount of the season's business and the earnings therefrom.

Regarding attorney fees, *In re Treadwell,* 23 Fed. 442, the Court held that a fee of $5,000.00, when an attorney had saved his client $30,000.00, was not excessive. In the present instance the attorney had saved his client $65,000.00, or thereabouts.

In *Colley v. Wolcott,* 187 Fed. 595, the Court said:

> "A court may properly make allowances for fees to attorneys for services rendered before it upon its own knowledge as to the extent and value of such services."

The Federal Court, in the cases of *Adams v. Kehlor Milling Co.,* 38 Fed. 281, and *Straus v. Victor Talking Machine Co.,* 297 Fed. 791, also followed the rulings in the above-cited case.

In *McDougal v. Black Panther Oil Co.,* 277 Fed. 701, the Court said:

> "In determining what is a reasonable attorney fee, some of the elements to be considered are character of service rendered, the manner in which rendered, the time occupied, the result obtained, and the responsibility resting on counsel.
>
> "In an action involving reasonable compensation for legal services, the Circuit Court of Appeals, as well as a trial court, may be considered experts on the value of legal services."

The Supreme Court of Oregon, in May, 1935, in the case of *Fisher v. German Co.,* 44 Pac. (2d) 1076, held that it was the Court's statutory duty to allow a

reasonable amount as attorney fees on entering judgment in an action for fraudulent representation, and that such allowance was not error, though no expert testimony was offered and the amount was not fixed by jury.

The Court, *inter alia,* said that in an action for damages it is mandatory for the Court to fix the attorney fee. This was an action for damages, but irrespective of that, it is mandatory in all cases for the District Courts in Alaska to fix the attorney fee allowable to the prevailing party. Evidently, this was the thought of plaintiff's attorneys, for, as pointed out hereinbefore, they prayed for a reasonable attorney fee, but offered no evidence of what a reasonable attorney fee would be. They were following the established practice of the Alaska Court in letting the Court fix the fee. Consequently, an allowance of $5,000.00 as a fee for saving the defendant's boat and barge, worth $55,000.00, and damages in the sum of $10,000.00, is just and reasonable.

In *People v. Thompson,* 43 Pac. (2d) 606, 607, the Court said:

> "The law, in relation to the fixing of attorney fees, is well stated in the case of City of Los Angeles v. Los Angeles-Inyo Farms Company, 134 Cal. App. 268, 25 P. (2d) 224, 227, as follows: 'The rule is established that, in fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion. * * *' "

Other cases which hold that a Court may fix attorney fees without evidence of value of service are:

Olson v. Boling, 252 Pac. 961 (Ore.);
Randolph v. Christensen, 265 Pac. 797 (Ore.);
Bowman v. Maryland Cas. Co., 263 Pac. 826 (Cal.);
Maxwell v. Young, 28 P. (2d) 989 (Okla.).

Some of the later Federal cases upon this point are, *Pond v. Goldstein,* 41 F. (2d) 76, which was an appeal from the District Court of the Territory of Alaska, First Division, in which case, at page 81, Judge Wilbur, speaking for this Court, said:

> "Appellant objects to the attorney's fees of $500 allowed plaintiff by the trial court. The statute of Alaska authorizes the successful litigant in a case of this kind to recover a reasonable attorney's fee to be fixed by the court. Compiled Laws of Alaska, 1913, Section 1341; Session Laws of Alaska, 1923, c. 38. We do not think the subsequent act of the territorial Legislature fixing an amount to be given to the plaintiff as costs repeals this legislation."

and in the case of *Forno v. Coyle,* 75 F. (2d) 692, at page 696, which was an appeal from the District Court for the Territory of Alaska, Fourth Division, Judge Wilbur for this Court further stated:

> "The appellant relies upon a number of cases decided by the Supreme Court of Oregon since 1921. These cases are not in point, since, as the appellant himself observes, they construe section 561 of the Oregon Laws (Olson, 1920), which was almost identical with section 1341 of the Laws

of Alaska, supra. Neither section 561 of the Oregon Laws nor section 1341 of the Alaska Laws, however, contains the provision as to 'reasonable' attorney's fees 'to be fixed by the court,' which is found in the act of 1923, supra.

"As to the objection that 'no evidence was submitted to the jury' on the question of what was a 'reasonable' attorney's fee, we need only point out that no such evidence was necessary. In Globe Indemnity Co. v. Sulpho-Saline Bath Co. (C.C.A. 8), 209 F. 219, 222, certiorari denied, 266 U. S. 606, 45 S. Ct. 92, 69 L. Ed. 464, the court said: 'The further point, in connection with the allowance of this (attorney's) fee, that there was no evidence as to a reasonable amount is not open to examination. If it were, we would be inclined to hold that the court is as good (a) judge of reasonableness of attorney fees for services in that court as any one. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence, and, as such, advisory but not binding upon the court.'

"See, also, State v. Glass, 99 Kan. 159, 160 P. 1145, 1146; Hurni v. Sioux City Stock Yards Co., 138 Iowa 475, 114 N.W. 1074, 1076; Woodward v. Brown, 119 Cal. 283, 51 P. (2d) 542, 63 Am. St. Rep. 108; Hotaling v. Monteith, 128 Cal. 556, 61 P. 95."

The latest case upon this point is *Stanolind Oil & Gas Co. v. Guertzgen, et al.,* 100 F. (2d) 299, an appeal from the Montana Courts, wherein Judge Healy, speaking for this Court, held:

"It is conceded that in actions where attorney's fee is recoverable as a matter of course, the court is permitted to act upon its own knowledge as to the value of the attorney's services, but it is contended that in the light of the final sentence of the statute, the question of attorney's fees is converted into an issue of fact upon which evidence must be taken.

"We think the point is without merit. The statute does not require a construction upsetting the generally accepted rule that a judge is permitted to appraise the legal services of counsel without, or independent of, any testimony on the subject. 7 C.J.S. 1093, 1094, Attorney & Client Sec. 191; Severson v. Barstow, 63 Pac. (2d) 1022."

The salient points of the instant case are: Did "Doc" Gordon, defendant, finance the building of the boat and barge "Elaine G" and promise to turn the same over to "Bud" Hager, plaintiff, when the boat and barge had earned enough to pay all the cost of building and operating the same? Did the boat and barge earn enough to pay all costs of building and operating during the 1945 season? Was the boat the property of the plaintiff from the time of building, up to April 20, 1946?

The jury considered these matters, and to the first question answered "Yes." To the second and third questions the answer was "No."

If the trial judge had felt that the evidence was preponderately in favor of the plaintiff, he would

have directed a verdict for plaintiff. When the jury has reached a verdict, Courts are reluctant to reverse such verdict unless palpable error has been committed and injustice done by such verdict. The jury had the opportunity, in the instant case, of observing the demeanor of the plaintiff and the defendant and of judging the truth of their statements. The jury's verdict indicated that the defendant's many years of river operation weighed heavily against plaintiff's meager experience. They could judge whether or not the plaintiff stood penniless, when he testified that he was a partner in two saloons at Fairbanks, Alaska.

CONCLUSION.

Appellee contends that the trial of the said cause was fairly conducted, that the instructions of law were proper; that the verdict of the jury was based upon competent legal evidence; that the judgment of the Court allowing an attorney's fee of $5,000.00 was reasonable; and that the verdict and judgment should be affirmed.

Dated, Fairbanks, Alaska,
October 15, 1948.

Respectfully submitted,
WARREN A. TAYLOR,
Attorney for Appellee.